A

Awalluddin bin Sham Bokhari v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–339–11 OF 2014
DAVID WONG, HAMID SULTAN AND AHMADI ASNAWI JJCA
12 JANUARY 2016

C *Criminal Procedure — Appeal — Appeal against order of forfeiture — High Court made forfeiture order pursuant to s 56(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Prosecution relied heavily on para 32 of affidavit of investigating officer which in substance purely hearsay — Whether contents of affidavit satisfied criteria* D *under O 41 r 5 of the Rules of Court 2012 — Whether High Court correct in relying on affidavit — Whether prosecution case proven on balance of probabilities — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 56 — Rules of Court 2012 O 41 r 5*

E This was an appeal by the appellant against a forfeiture order made by the High Court pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). In the present case, it must be noted that though the prosecution had made an F application for forfeiture supported by an affidavit, the appellant had opposed the application by giving oral evidence as well as calling three witnesses in support of his defence. Thus, this was a hybrid case, in relation to evidence by affidavit and oral evidence by oath. It was also not disputed that the prosecution was heavily relying on para 32 of the affidavit of the investigating G officer ('the IO') which in substance was purely hearsay. The appellant submitted that the burden of proof was on the prosecution and it must be discharged on the balance of probabilities under the Act and that the prosecution had failed to do so. The appellant further argued that the prosecution failed to call witness in relation to the allegation set out in para 32 H of the affidavit of the IO and in consequence the prosecution case was not proved on the balance of probabilities.

Held, setting aside the order of the High Court and ordering that the property seized to be returned to the appellant:

I (1) When it relates to affidavit evidence, hearsay evidence to some extent is permissible provided the provision stated in O 41 r 5 of the Rules of Court 2012 ('the ROC') is satisfactorily complied with. In the present case, O 41 r 5(2) of the ROC was not applicable as the application was not an interlocutory application, as any orders made by the court would

fully dispose of the matter. It is strict rule of law, when it is not an interlocutory application, for the applicant to comply with O 41 r 5(1) of the ROC. Under this order, the deponent can only depose to facts which he can prove from his own knowledge. In the instant case, the contents of the affidavit also did not satisfy the criteria set out in O 41 r 5(1) of the ROC. Consequently, the learned trial judge was in grave error in even relying on an affidavit which was not worth the paper it was written on. In totality, the prosecution had not established the case according to law and the order of forfeiture was against the law and the Federal Constitution (see paras 8–10, 12 & 16).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap perintah pelucuthakan oleh Mahkamah Tinggi menurut s 56(1) Akta Pengubahan Wang Haram dan Pembiayaan Anti-Keganasan 2001 ('Akta'). Dalam kes ini, perlu ditekankan bahawa meskipun pendakwaan telah membuat permohonan untuk pelucuthakan yang disokong oleh afidavit, perayu telah membantah permohonan dengan memberi keterangan lisan dan juga memanggil tiga saksi bagi menyokong pembelaannya. Oleh itu, ini adalah kes hibrid, berkaitan keterangan melalui afidavit dan keterangan lisan melalui sumpah. Ia juga tidak dipertikaikan bahawa pendakwaan amat bergantung kepada perenggan 32 afidavit pegawai penyiasat ('PP') yang secara substans adalah semata-mata dengar cakap. Perayu berhujah bahawa beban bukti terletak pada pendakwaan dan ia perlu dilepaskan atas imbangan kebarangkalian di bawah Akta tersebut dan bahawa pendakwaan telah gagal berbuat sedemikian. Perayu selanjutnya berhujah bahawa pendakwaan telah gagal untuk memanggil saksi berkaitan pengataan yang diyatakan dalam perenggan 32 afidavit PP dan akibatnya kes pendakwaan tidak dibuktikan atas imbangan kebarangkalian.

Diputuskan, mengetepikan perintah Mahkamah Tinggi dan memerintahkan bahawa hartanah yang disita dikembalikan kepada perayu:

(1) Apabila ia berkaitan keterangan afidavit, keterangan dengar cakap sehingga satu tahap sedikit sebanyak dibenarkan dengan syarat peruntukan yang dinyatakan dalam A 41 k 5 Kaedah-Kaedah Mahkamah 2012 ('KM') telah dipatuhi dengan memuaskan. Dalam kes ini, A 41 k 5(2) KM tidak terpakai kerana permohonan itu bukan permohonan interlokutori, kerana mana-mana perintah yang dibuat oleh mahkamah akan menyelesaikan sepenuhnya perkara tersebut. Ia adalah rukun undang-undang yang tegar, apabila ia bukan suatu permohonan interlokutori, untuk pemohon mematuhi A 41 k 5(1) KM. Di bawah perintah ini, deponen hanya akan mendeposkan fakta yang boleh dibuktikannya berdasarkan pengetahuannya sendiri. Dalam kes ini, kandungan afidavit juga tidak memenuhi kriteria yang dinyatakan dalam A 41 k 5(1) KM. Berikutan itu, hakim perbicaraan yang bijaksana

memang terkhilaf kerana bergantung kepada afidavit yang tidak mempunyai nilai apa-apa. Secara keseluruhan, pendakwaan tidak membuktikan kes menurut undang-undang dan perintah pelucuthakan adalah menyalahi undang-undang dan Perlembagaan Persekutuan (lihat perenggan 8–10, 12 & 16).]

Notes

For a case on appeal against order of forfeiture, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 505.

Cases referred to

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors [2003] 5 MLJ 233; [2003] 1 AMR 606, HC (refd)
Wong Hong Toy & Anor v PP [1988] 2 MLJ 553 (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2) [1998] 5 MLJ 1; [1997] 4 AMR 3214, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 56(1)
Evidence Act 1950 ss 32, 73A, 90A, 114(g)
Federal Constitution
Rules of Court 2012 O 41 r 5, 5(1), (2)

Appeal from: Criminal Trial No 44–338–11 of 2011 (High Court, Kuala Lumpur)

Md Yunos bin Shariff (Arman-Yunos) for the appellant.
Nur Ashikin Mokhtar (Nik Haslinie bt Hashim with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant appeals against a forfeiture order made by the High Court pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'), came up for hearing on 4 September 2015 and we adjourned the matter to another date to enable the parties to submit their authorities on two issues for the determination of the appeal. The learned deputy public prosecutor has summarised the two pertinent issues as follows:

5. The issues for determination by this Honorable Court, namely:

(a) Whether the trial High Court Judge had satisfied the first threshold of s 56(2) of the Act which required the Applicant to prove, on the balance of

probabilities, that the seized properties were the subject matter of or used in the commission of an offence under s 4 of the Act. A

(b) Whether the trial High Court Judge had evaluated the Appellant's evidence, on the balance of probabilities, before he granted the order of forfeiture in respect of the seized properties. B

[2] The matter was fixed for continued hearing on 26 November 2015 and upon hearing, we reserved our judgment. My learned brothers David Wong Dak Wah and Ahmadi bin Hj Asnawi JJCA have read the judgment and approved the same. This is our judgment. C

[3] We do not think it is necessary to set out the facts in detail as it has been dealt with by the learned High Court judge. What is important to keep in mind in this case is that though the prosecution has made an application for forfeiture supported by an affidavit, the appellant has opposed the application by giving oral evidence as well as calling three witnesses in support of his defence. Thus, is a 'hybrid' case, in relation to evidence by affidavit and oral evidence by oath. D

[4] It is also not in dispute in this case that the prosecution was heavily relying on para 32 of the affidavit of IO which in substance was purely hearsay. It was the contention of the learned counsel for the appellant that: E

(a) the burden of proof is on the prosecution and it must be discharged on the balance of probabilities under the Act and that prosecution has failed to do so; F

(b) the prosecution has failed to call witness in relation to the allegation set out in para 32 and in consequence the prosecution case was not proved on the balance of probabilities more so when the defence had called three witnesses and the IO had during cross-examination admitted that there was no nexus between the appellant and the second respondent in the show cause notice stated above; G

(c) in addition, the IO has also admitted during cross-examination that the appellant was not involved in forging the alleged warrants, and the appellant did not know that the second respondent was misconducting himself unlawfully; and H

(d) the IO evidence during cross-examination taken as a whole had rebutted para 32 of the IO affidavit. The answers in the cross-examination of the IO was not clarified or rebutted by the prosecution, ie the damage done to the prosecution case during cross-examination was not repaired. I

[5] The para 32 of the affidavit of the prosecution filed by the IO reads as follows:

A Saya seterusnya menegaskan bahawa saya telah menjalankan siasatan terhadap saksi-saksi dan responden-responden dan merekodkan percakapan saksi-saksi dan responden-responden di bawah Seksyen 32 AMLATFA 2001, yang mana saya sesungguhnya mempercayai dari keterangan-keterangan yang ada bahawa harta-harta alih yang disita di atas adalah harta-harta yang berkaitan dengan suatu B kesalahan di bawah Subseksyen 4(1) AMLATFA 2001 yang mana kesemua harta tersebut telah diperolehi hasil daripada aktiviti haram iaitu hasil daripada pemalsuan waran-waran Udara MTL untuk menipu TLDM bagi mendapatkan tiket-tiket kapal terbang untuk dijual kepada orang awam yang dilakukan oleh responden pertama bersama-sama responden kedua dan responden ketiga yang C merupakan satu kesalahan di bawah Seksyen 420 Kanun Keseksaan. Sebahagian harta-harta responden pertama juga diperolehi daripada aktiviti haram iaitu hasil penipuan dalam tuntutan waran-waran Bas MTL dan tuntutan perbatuan.

[6] It must be noted that it is a requirement of law under the Act in an D application of this nature that the prosecution has to establish its case on the balance of probabilities. That is the civil standard relating to trial and courts ought to be vigilant in dealing with hearsay evidence per se and cannot allow hearsay evidence to be made admissible, unlike affidavit evidence where the threshold is low and the Evidence Act 1950 ('the EA 1950') does not apply.

E

[7] The distinction between the admissibility of evidence in relation to oral evidence under oath and evidence of affidavit is not like an apple and orange but one of the size of marble and pumpkin in relation to probative value.

F **[8]** When it relates to oral evidence, the applicant cannot rely on hearsay evidence unless such evidence is made admissible under the exception to the hearsay rule. For example, under ss 32 or 73A or 90A, etc. Failure to call the relevant witness may also attract s 114(g) of the EA 1950, etc. When it relates to affidavit evidence, hearsay evidence to some extent is permissible provided G the provision stated in O 41 r 5 of the Rules of Court 2012 is satisfactorily complied with. The said rules read as follows:

5(1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

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(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

I **[9]** In the instant case, O 41 r 5(2) is not applicable as the application is not an interlocutory application, as any orders made by the court will fully dispose of the matter.

[10] It is strict rule of law when it is not an interlocutory application for the

applicant to comply with O 41 r 5(1). Under this order, the deponent can only depose to facts which he can prove from his own knowledge (see *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2)* [1998] 5 MLJ 1; [1997] 4 AMR 3214). The learned authors of *Janab Key to Civil Procedure* (5th Ed) at p 331 in respect of interlocutory application have this to say:

> Generally, the contents of the affidavit may only contain such facts as the deponent is able of his own knowledge to prove. However, in case of hearsay evidence, it may be stated in the affidavit provided the source of the information and the grounds thereof is also stated (see *Harrison v Bottenheim* [1978] 26 WR 362).

[11] The probative weight under O 41 r 5(1) or (2) to be given depends on the facts of the case as well as the probative strength of the respondent's reply as well as the factual matrix of the case. When a matter is hotly disputed, the court cannot simply rely on affidavits. Support for the proposition is found in a number of cases (see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors* [2003] 5 MLJ 233; [2003] 1 AMR 606).

[12] The contents of the affidavit also do not satisfy the criteria set out in O 41 r 5(1). In consequence, the learned trial judge was in grave error in even relying on an affidavit which is not worth the paper it is written on.

[13] It must be asserted that courts in criminal cases must not take a lethargic attitude to hearsay evidence as was done in this case as it will infringe on several articles of the Federal Constitution and make any decision of the court unconstitutional (see *Wong Hong Toy & Anor v Public Prosecutor* [1988] 2 MLJ 553).

[14] Thus, when a case is dealt by affidavit as well as oral evidence, the EA 1950 will become applicable save to say that where documents have been exhibited by affidavit, it remains admissible but the court has to deal with the totality of the evidence to give relevant probative value to the exhibits. Where an exhibit or evidence is credibly challenged the burden of proof of prima facie case placed on a plaintiff or petitioner and/or applicant as the case may be, does not shift even though in a normal trial by oral evidence a plaintiff's case on prima facie basis need to be established before the defence is obliged to call his evidence. If a prima facie case is not established, a defendant may elect not to call his evidence. The law in this area is well established. However, when the application is by affidavit and oral evidence, the applicant cannot rest on laurels to assume that the affidavit in support with the hearsay evidence and/or exhibit is sufficient to succeed on balance of probabilities, that too in a quasi-criminal application like the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, where the statute expressly says that

A the prosecution has to establish its case on the balance of probabilities.

[15] In the instant case, the learned trial judge had not made out the distinction which we have set out earlier and had relied on purely hearsay evidence as trumpeted by the prosecution to forfeit as per the show cause notice which reads as follows:

B

ANTI-MONEY LAUNDERING, ANTI-TERRORISM FINANCING AND PROCEEDS OF UNLAWFUL ACTIVITIES ACT 2001

NOTICE TO THIRD PARTIES

C

IN exercise of the powers conferred by subsection 61(2) of the Anti-money Laundering, Anti-terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613], notice is given to any third party who claims to have any interest in the properties specified in the Schedule which are the subject matter in the proceedings under subsections 56(1) and 61(2) of the Act against Simathari a/l Somenaidu (Service No: T 815855), Sharafaizan binti Abdul Samad (NRIC No 780905–08–5214) and Awalluddin bin Sham Bokhari (NRIC No 700705–04–5389) to attend before the High Court 1, Kuala Lumpur on 23 July 2012 at 8.30 a.m. to show cause as to why the property shall not be forfeited.

D

E SCHEDULE

1. Cash totalling RM102,317.86 and any accretion to it in the savings account of Simathari a/l Somenaidu at Maybank Berhad, Pandan Jaya Branch, Ampang, Selangor, account number 112250031799;

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2. Cash totalling RM142,566.11 and any accretion to it in the savings account of Simathari a/l Somenaidu at Maybank Berhad, Lumut Branch, Perak, account number 108168150449

3. Cash totalling RM103,584.87 and any accretion to it in the savings account of Simathari a/l Somenaidu at Maybank Berhad, Pandan Jaya Branch, Ampang, Selangor, account number 112250045835

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4. Cash totalling RM51,886.38 and any accretion to it in the current account of Sharafaizan binti Abdul Samad at Al-Rajhi Banking & Investment Corporation (M) Berhad, Ampang Branch, Selangor, account number 105001080262179

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5. Cash totalling RM9,991.57 and any accretion to it in the Amanah Saham Bumiputra investment account of Sharafaizan binti Abdul Samad at Permodalan Nasional Berhad, Head Office, Kuala Lumpur, account number 951412035

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6. Cash totalling RM7,274.60 any accretion to it in the CIMB Islamic Dali Equity Theme Fund investment account of Awalluddin bin Sham Bokhari at CIMB Bank Berhad, Kuala Lumpur, account number A 80054198

7. Banker's cheque Maybank Berhad, Subang Perdana Branch, Kuala Lumpur No 019113 totalling RM12,000.00 which was seized on 20 June 2011

8. BMW R 1200 RT motorcycle with registration number WSX 54 owned by Awalluddin bin Sham Bokhari

9. Harley Davidson Sportster-XL 883N motorcycle with registration number WTY 54 owned by Awalluddin bin Sham Bokhari

10. Hyundai Starex TQ 2.5 GLS(A) motorvan with registration number WTM 54 owned by Awalluddin bin Sham Bokhari

11. Toyota Hilux Double Cab 2.SAT motorvan with registration number WSH 854 owned by Awalluddin bin Sham Bokhari

12. Honda City 1.5 Vtec (A) motorcar with registration number WNW 9200 owned Simathari a/l Somenaidu.

[16] We have read the appeal record and the able submission of the parties. After much consideration to the submission of the learned deputy public prosecutor, we take the view that the prosecution has not established the case according to law and the order of forfeiture is against the law and the Federal Constitution and in consequence the order of the High Court is set aside and the property seized is ordered to be returned to the appellant.

We hereby order so.

Order of High Court set aside; property seized ordered to be returned to appellant.

Reported by Dzulqarnain Ab Fatar